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Utah Supreme Court

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### Recommended Citation

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Case No. 9137

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

APR 28 1960

NATIONAL FINANCE COMPANY  
OF UTAH,

*Plaintiff and Respondent,*

vs.

CARLOS J. VALDEZ,

*Defendant and Appellant.*

Clerk, Supreme Court, Utah

UNIVERSITY OF UTAH

BRIEF OF APPELLANT

JUL 10 1967

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BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Numbers in parenthesis refer to pages in the record.  
Parties will be referred to as in the court below.

STATEMENT OF THE CASE

This is an appeal from a judgment entered in favor of plaintiff and against defendant. The case was tried to the court without a jury and this appeal attacks the Findings of Fact and Conclusions of Law and Judgment. (R. 44-48).

The defendant and his wife obtained a loan from plaintiff on March 21, 1957, in the sum of \$1,920.00. They executed a note and chattel mortgage as security for the note. (R. 3)

On August 9, 1957, defendant filed a voluntary petition in bankruptcy in the United States Court for the District of Utah and listed the debt due and owing to plaintiff in his bankruptcy petition. The bankruptcy matter was processed and plaintiff received personal notice of the proceedings, but filed no objections to the discharge.

Before the completion of the bankruptcy matter, plaintiff commenced this action on the note and prayed for a foreclosure of the chattel mortgage. Plaintiff alleged a written financial statement prepared by defendant at the request of plaintiff did not include all of defendant's obligations and was false and fraudulent. Defendant admitted the execution of the note and chattel mortgage, but denied the falsity of the financial statement and alleged the obligation had been discharged in bankruptcy.

At the trial, defendant stipulated if plaintiff's manager, Mr. Kerr, were called as a witness he would testify as to the execution of the financial statement, that he relied on the statement in granting the loan and would not have made the loan if defendant had designated all of his obligations. (R. 19) No other testimony was introduced by either party.

Based on this stipulation the trial court entered

Findings of Fact and Conclusions of Law and Judgment. In Finding of Fact No. 5, the court found defendant had submitted to plaintiff a written financial statement with the intent and effect of deceiving plaintiff and inducing said loan. The court further found the representations were false and fraudulent and this was known by defendant. The court then concluded as a matter of law that the debt sued upon by plaintiff was not affected by the discharge in bankruptcy because the loan had been secured by false pretenses and false representations. (R. 45) Defendant's objection to the Findings of Fact and Conclusions of Law (R. 50-51) and Motion to supplement the record (R. 49) and new trial (R. 57) were denied by the court. (R. 59). Defendant contends these rulings and entry of judgment were error.

## STATEMENT OF POINTS

### POINT I.

THE TRIAL COURT ERRED IN RULING THE DEBT SUED UPON BY PLAINTIFF WAS NOT DISCHARGED IN BANKRUPTCY.

### POINT II.

THE TRIAL COURT ERRED IN FINDING DEFENDANT MADE FALSE AND FRAUDULENT MISREPRESENTATIONS.

### POINT III

PLAINTIFF WAIVED THE RIGHT TO CLAIM FRAUD.

## ARGUMENT

### POINT I.

THE TRIAL COURT ERRED IN RULING THE DEBT SUED UPON BY PLAINTIFF WAS NOT DISCHARGED IN BANKRUPTCY.

The Bankruptcy Act, Title 11, U.S.C.A. Chapter 3, Section 35 provides as follows:

(a) "A discharge in bankruptcy shall release a bankrupt from all of his proveable debts, whether allowable in full or in part, except such as \* \* \* (2) are liabilities for obtaining money or property by false pretenses or false representations, \* \* \*"

In this case the trial court decreed the debt sued upon by plaintiff was within the provisions of the above-mentioned statute and the debt was not discharged by the bankruptcy proceedings. (R. 48)

The applicability of this statute to similar fact situations has been construed in several decisions.

In the matter of *Kenneth Dickson Forgay*, 140 F. Supp., 473 (Utah) there was a default judgment entered in the Salt Lake City Court on a note executed by the defendant. The complaint in the action alleged a false financial statement had been executed by the borrower to induce the loan. The trial court enjoined a garnishment proceeding on the judgment and stated as follows on Page 474:

"In this case before us the State Court action is *founded upon the debtors note*. The loan company took a *judgment on the note*, which included interest and attorneys fees as provided in the note."

On Page 480 the court stated:

"\* \* \* In this case the court has before it a judgment entered by the State Court which judg-



ment is upon the note and not upon fraud and the debt evidenced by the note has been discharged in the bankruptcy proceeding.”

The decision was appealed to the Tenth Circuit Court of Appeals. *In The Matter of Kenneth Dickson Forgay*, 240 F. 2d 18, in affirming the decision the court stated on Page 20:

“\* \* \* An examination of the complaint in the State Court leads to the conclusion that the cause of action stated was predicated upon the debt and not upon fraud. The default judgment it obtained was merely for the amount of its claim and did not purport to be a fraud judgment. In fact, the judgment did not refer to fraud in any way.”

In *Personal Finance Company of Colorado v. Martinaz*, 115 F. 2d 226, was an action instituted by the finance company against the defendant bankrupt. The complaint alleged the execution of the note, the false financial statement and prayed for *damages* in the sum of \$150.00. An order enjoining the enforcement of the judgment was reversed. In reversing the order the court referred to Section 35 of the Bankruptcy Act and then stated:

“It follows that a discharge in bankruptcy would not release Martinaz from the claim asserted in the State Court.”

See *Beneficial Loan Co. v. Noble*, 129 F. 2d 425 where the complaint and judgment awarded *damages* for fraud.



See *State Finance Co. v. Morrow*, 216 F. 2d 676.

In *Household Finance Corporation v. Dunbar*, 262 F. 2d 112, the finance company secured a default judgment in a state court wherein a financial statement was alleged to have been false and fraudulent. The judgment entered by the court was for the total sum due and owing on the note together with interest. The District Court granted an injunction.

The court reversed the order on another point, but in discussing the judgment entered by the court the following was stated on Page 114:

“It seems clear to us that regardless of the allegations with respect to the alleged false financial statement in the bill of particulars filed in the state court action, such action was brought on the note; sought judgment on the note with interest thereon according to the terms of the note; judgment was rendered on the note for the balance of the principal thereof, with interest thereon according to the tenor of the note; and that neither the action brought nor the judgment rendered was for fraud and deceit. This, we think, was clearly manifested by the allowance of interest in accordance with the tenor of the note, rather than legal interest for damages, if any, suffered by the alleged fraud.”

In the case at bar the judgment rendered by the court decreed defendant to be indebted to plaintiff in an amount equal to the balance due and owing on the note. Allowed plaintiff attorney's fees and a deficiency judgment. Defendant contends this judgment is similar in all

respects to the judgments discussed in the cited cases. In view of this fact, it is obvious this action and judgment is not to enforce a liability for obtaining money or property by false pretenses, but is the enforcement of a debt which has been discharged in bankruptcy. Therefore, the debt sued upon by plaintiff is not exempted from the provisions of the United States Bankruptcy Act and the trial court committed error in entering the judgment.

## POINT II.

THE TRIAL COURT ERRED IN FINDING DEFENDANT MADE FALSE AND FRAUDULENT MISREPRESENTATIONS.

Without abandoning the argument made under Point I of this Brief, defendant respectfully submits there is not sufficient evidence in the record to sustain a finding of fraud.

This court has set forth the required elements necessary to sustain an action of fraud. In *Kinnear et al v. Prows et al*, 16 P. 2d 1094, 81 U. 135 at Page 138 the court stated the following:

“The elements necessary to constitute actionable fraud are stated in the first headnote of *Stuck v. Delta Land & W. Co.*, 63 Utah 495, 227 P. 791, as follows:

‘Elements of ‘actual fraud’ consists of (1) a representation; (2) its falsity; (3) its materiality; (4) speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by person and in manner reasonably con-

templated; (6) hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.'"

Applying these principles to the evidence adduced in this case defendant respectfully submits plaintiff failed to sustain its burden in proving these elements.

The only evidence presented in this case pertaining to the false and fraudulent misrepresentations of defendant was by stipulation. Defendant stipulated the financial statement executed by defendant was incomplete in that it did not contain a complete statement of his financial condition at the time the note was executed. Defendant further stipulated if plaintiff's manager were called to testify he would testify as to the incompleteness of the statement; that he relied upon the statement in making the loan and would not have made the loan but for this statement.

Defendant submits the foregoing stipulation does not include facts necessary to sustain a finding of actionable fraud. The stipulation does not contain facts from which the court could find defendant knew the financial statement was material to the company. The stipulation does not prove plaintiff advised defendant the financial statement submitted to them must be a complete statement of his existing financial condition and unless it was complete the company would not execute the loan.

We submit that because the stipulation was void as to these facts, the admitted evidence is not sufficient to

permit the court to find plaintiff relied upon the truth of the statement in making the loan or that it had a right to rely thereon. In view of this condition of the record we contend essential elements in an action for fraud are lacking.

The trial court *assumed* all the necessary elements of actionable fraud were included in the stipulation, but we submit the court was not permitted to make such an assumption.

The evidence in the record does not support a finding of fraud and the trial court erred in so ruling.

### POINT III

#### PLAINTIFF WAIVED THE RIGHT TO CLAIM FRAUD.

This case was instituted by plaintiff after defendant had filed his petition in bankruptcy. At the time the action was commenced, plaintiff knew of the difference between the debts listed by defendant on his financial statement and the debts listed in his bankruptcy schedule. Being aware of these facts, plaintiff had the burden to either elect to sue in tort for an alleged fraud or to elect to rely on the contract and sue in an action for contract. See 18 Am. Jur., Election of Remedies, Sections 37 and 38.

In this case, plaintiff elected to rely on the contract in instituting his action. We contend that under these circumstances the issue of fraud has been waived by the plaintiff.

## CONCLUSION

Defendant respectfully submits the trial court committed error in ruling this action and judgment is exempt from the provisions of the Bankruptcy Act. We further contend the evidence is insufficient to support a finding of actionable fraud and that plaintiff had waived its rights to assert fraud.

Defendant respectfully submits that in view of these errors the decision of the trial court should be reversed, and judgment be entered in favor of defendant.

Respectfully submitted,

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